

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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LEAH H.,

Plaintiff,

v.

Civil Action No.  
3:23-CV-591 (DEP)

MARTIN J. O'MALLEY,  
Commissioner of Social Security,<sup>1</sup>

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LACHMAN, GORTON LAW FIRM  
P.O. Box 89  
1500 East Main Street  
Endicott, NY 13760

PETER GORTON, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.  
6401 Security Boulevard  
Baltimore, MD 21235

CANDACE BROWN CASEY, ESQ.

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<sup>1</sup> Plaintiff's complaint named Kilolo Kijakazi, in her official capacity as the Acting Commissioner of Social Security, as the defendant. On December 20, 2023, Martin J. O'Malley took office as the Commissioner of Social Security. He has therefore been substituted as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, and no further action is required in order to effectuate this change. See 42 U.S.C. § 405(g).

DAVID E. PEEBLES  
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. § 405(g) and 42 U.S.C. § 1383(c)(3), are cross-motions for judgment on the pleadings.<sup>2</sup> Oral argument was conducted in connection with those motions on July 17, 2024, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court’s oral bench decision, a transcript of which is attached and incorporated herein by

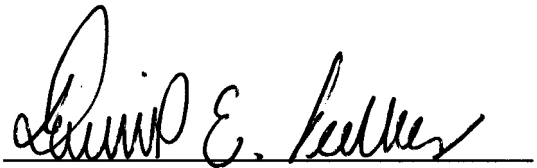
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<sup>2</sup> This action is timely, and the Commissioner does not argue otherwise. It has been treated in accordance with the procedures set forth in the Supplemental Social Security Rules and General Order No. 18. Under those provisions, the court considers the action procedurally as if cross-motions for judgment on the pleadings have been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

reference, it is hereby

ORDERED, as follows:

- 1) Plaintiff's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.
- 3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.
- 4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.



David E. Peebles  
U.S. Magistrate Judge

Dated: August 7, 2024  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----X  
LEAH M. HAWK,

Plaintiff,

vs.

Civil Action No. 3:23cv00591

MARTIN J. O'MALLEY,  
COMMISSIONER OF SOCIAL SECURITY,

Defendant.

-----X

Transcript of a Decision from a Teleconference  
Hearing held on July 17, 2024, the  
HONORABLE DAVID E. PEEBLES, United States Magistrate  
Judge, Presiding.

A P P E A R A N C E S

For Plaintiff: LACHMAN, GORTON LAW FIRM  
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1500 East Main Street  
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BY: PETER A. GORTON, ESQ.

For Defendant: SOCIAL SECURITY ADMINISTRATION  
6401 Security Boulevard  
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*Lisa M. Mazzei, RPR  
Official United States Court Reporter  
10 Broad Street  
Utica, New York 13501  
(315) 266-1176*

1 (The following is an excerpt of a  
2 teleconference hearing held on 7/17/2024.)

3 THE COURT: All right. Let me begin by thanking  
4 both of you for excellent presentations. I have enjoyed  
5 working with you. This was an interesting case with a great  
6 deal of evidence to parse through, and so I -- I enjoyed  
7 working with you, and I think I was able to arrive at a fair  
8 determination.

9 Plaintiff has commenced this proceeding pursuant to  
10 42 United States Code Section 405(g) and 1383(c)(3) to  
11 challenge an adverse determination by the Acting Commissioner  
12 of now the Commissioner of Social Security, finding that she  
13 was not disabled at the relevant times and therefore  
14 ineligible for the benefits sought. The background is as  
15 follows:

16 Plaintiff -- and before I get into the substance, I  
17 should, for the record, state that we established at the  
18 outset of oral argument that despite the fact that the  
19 consent originally given by plaintiff was to  
20 Magistrate Judge Daniel J. Stewart, plaintiff has consented  
21 to my deciding the issue, since it has been transferred to me  
22 by our Chief Judge.

23 In terms of background, plaintiff was born in July  
24 of 1975. She is currently 49 years of age. She just turned  
25 49. She stands 4 foot 11 inches in height and has weighed,

1 at relevant times, between 140 and 160 pounds.

2 Plaintiff is divorced. She has one child who does  
3 not live with her. She is, or at least was at one time  
4 living in Endicott with her aunt. Plaintiff has a high  
5 school education and attended regular classes. She has  
6 apparently taken some college courses as well.

7 Plaintiff is right-handed. She does not have a  
8 driver's license due to apparently some driving while  
9 intoxicated convictions, but stated that she could drive, if  
10 she did have a license.

11 Plaintiff last worked in late 2013 or early 2014.  
12 While working, she was, at various times, a receptionist.  
13 She worked at an answering service, she worked in data entry,  
14 and she was a medical assistant.

15 Physically, plaintiff suffers from several  
16 impairments, including obesity, myofascial pain syndrome  
17 associated with changes in her spine; left ankle pain or  
18 sprain, bilateral knee pain, asthma and hypertension. She  
19 has undergone multiple left knee surgeries, most recently in  
20 June of 2022.

21 Mentally, plaintiff's condition has been variously  
22 diagnosed, including as post-traumatic stress disorder, or  
23 PTSD, bipolar disorder, generalized anxiety disorder, panic  
24 disorder with agoraphobia, depression. She has a history of  
25 severe alcohol and polysubstance abuse, and a personality

1 disorder.

2 Plaintiff stopped drinking in 2014, after  
3 undergoing rehabilitation at New Horizons. She did have a  
4 one-day binge in April of 2017 that resulted in her being  
5 sent to CPEP.

6 She apparently hears voices and sees  
7 hallucinations, both auditory and visual. She has difficulty  
8 leaving her house. She's had three psychiatric  
9 hospitalizations; a history of cutting herself, potential  
10 suicide ideation or attempts.

11 She has been seen by various providers. Her  
12 primary is Physician's Assistant Kacy Zelesnikar, who she has  
13 seen since January of 2014.

14 In terms of activities of daily living, plaintiff  
15 is able to dress, bathe, groom. She does some cooking. She  
16 cleans, she does laundry, she does occasional shopping. She  
17 watches television, listens to the radio. She takes public  
18 transportation, although primarily through Medicaid vans and  
19 cabs, and sometimes the bus.

20 Plaintiff smokes approximately a half pack of  
21 cigarettes a day.

22 (Peter Gorton, Esq. was disconnected from the  
23 teleconference.)

24 THE COURT: We just lost Attorney Gorton. Let's  
25 wait and see if he rejoins.

1 Attorney Casey Brown, have you been able to hear  
2 me? Brown Casey?

3 MS. BROWN CASEY: Yes, your Honor. I have.

4 THE COURT: And, Lisa, our court reporter, you're  
5 able to hear me?

6 COURT REPORTER: Yes, Judge.

7 (Peter Gorton, Esq. was reconnected to the  
8 teleconference.)

9 THE COURT: We lost you for a second.

10 MR. GORTON: I know. I have Attorney Brown Casey's  
11 computer on my phone or something. I don't know. It -- I  
12 was listening and it just died, so I called it right back.

13 THE COURT: All right. Well, let me pick up where  
14 I left off.

15 Procedurally, plaintiff applied for a Title II and  
16 Title XVI benefits under the Social Security Act in July of  
17 2016, alleging an onset date for her disability of October --  
18 November 4, 2013.

19 At page 377 of the administrative transcript, she  
20 claimed disability based on obsessive compulsive disorder,  
21 post-traumatic stress disorder, anxiety, bipolar disorder,  
22 schizoaffective disorder, depression, bulging discs, left  
23 ankle impairment, hypertension and asthma.

24 A hearing was conducted on August 20, 2018, by  
25 Administrative Law Judge Elizabeth Koennecke. A supplemental



1 hearing with a vocational expert was subsequently conducted  
2 by ALJ Koennecke on January 9, 2019. Judge Koennecke issued  
3 an unfavorable decision on January 17, 2019. It was noted in  
4 her decision that there were prior filings of Title II  
5 application in October of 2011 and Title II and Title XVI  
6 applications in May of 2014. ALJ Koennecke found no basis to  
7 reopen those prior unfavorable determinations associated with  
8 those applications.

9 The matter proceeded to this Court by way of  
10 challenge by plaintiff's counsel on her behalf. It was filed  
11 on April 20, 2020. It resulted in a decision from Magistrate  
12 Judge Christian F. Hummel on September 3, 2021, remanding the  
13 matter. The basis was the failure of the appeals counsel to  
14 consider a subsequently-provided opinion of Dr. Anne Calkins,  
15 identified by plaintiff in the submission of that opinion as  
16 a treating source.

17 The matter was then remanded by the appeals counsel  
18 on March 5, 2022. Judge Koennecke conducted a hearing on  
19 February 28, 2023, with a vocational expert and subsequently  
20 issued another unfavorable decision on March 9, 2023. This  
21 action was commenced on May 16, 2023, and is timely. In her  
22 second decision, ALJ Koennecke applied the familiar five-step  
23 sequential test for determining disability.

24 She concluded at step one, that plaintiff had not  
25 engaged in substantial gainful activity since November 4,

1 2013. Although she did note that plaintiff worked in  
2 catering in 2014, but -- and did not include that on her work  
3 history, but there is no report of any earnings associated  
4 with that.

5 At step two, ALJ Koennecke concluded that plaintiff  
6 does suffer from severe impairments that impose more than  
7 minimal limitations on her ability to perform work-related  
8 functions including obesity, myofascial pain syndrome, and  
9 all mental impairments, as variously categorized.

10 At step three, ALJ Koennecke concluded that  
11 plaintiff's conditions did not meet or medically equal any of  
12 the listed presumptively disabling conditions set forth in  
13 the Commissioner's regulations specifically addressing  
14 obesity under Social Security Ruling 19-2P, and the mental  
15 impairments under listings 12.04, 12.6, 12.08 and 12.15.

16 After reviewing the evidence of record,  
17 ALJ Koennecke next concluded that plaintiff retains a  
18 residual functional capacity, or RFC, to perform light work  
19 with exceptions, including the following:

20 She retains the ability to understand and follow  
21 simple instructions and directions, perform simple tasks  
22 independently, maintain attention and concentration for  
23 simple tasks, regularly attend to a routine and maintain a  
24 schedule, relate to and interact appropriately with all  
25 others to the extent necessary to carry out simple tasks, and

1 to make occasional decisions directly related to the  
2 performance of simple tasks in a stable work environment with  
3 light work duties.

4 Applying that RFC at step four, ALJ Koennecke  
5 concluded that plaintiff is incapable of performing her past  
6 relevant work and proceeded to step five, where with the  
7 assistance of testimony from a vocational expert she  
8 concluded that plaintiff is capable of performing work that  
9 is available in the national economy and cited, as three  
10 examples, positions of mail clerk, sales attendant, and  
11 cashier two.

12 As counsel knows, the Court's function in this case  
13 is limited to determining whether the correct legal  
14 principles were applied and the resulting determination is  
15 supported by substantial evidence which is defined as such  
16 relevant evidence as a reasonable mind would find sufficient  
17 to support a conclusion.

18 The Second Circuit noted in *Brault vs. Social*  
19 *Security Administration Commissioner* 683 F.3d 443 from the  
20 Second Circuit in 2012 that this is an extremely differential  
21 standard. More rigorous than the clearly erroneous standard  
22 that we as lawyers are familiar with. That was reiterated  
23 later in *Schillo vs. Kijakazi*, 31 F.4th 64 from the Second  
24 Circuit, April 6, 2022.

25 In this case, plaintiff raises several contentions,

1     which I have kind of boiled down. First, she challenges the  
2     RFC determination and argues that it results in errors --  
3     results from errors in weighing the various medical opinions  
4     in the record. She challenges both the physical aspects,  
5     that being the ability to stand and walk for six to eight  
6     hours a day and the need -- no need to shift positions, and  
7     the mental aspects. Specifically, the requirement that  
8     plaintiff remain on task, she attend, and -- regularly, and  
9     in her ability to relate to others. She also argues that at  
10    step two, the ALJ committed error by not finding that  
11    plaintiff's left knee condition was a medically determinable  
12    impairment.

13             Pivotal to a disability determination is an ALJ's  
14    RFC assessment, which represents a range -- the finding of a  
15    range of tasks that the claimant is capable of performing,  
16    notwithstanding his or her impairments at issue. 20 CFR  
17    Sections 404.1545(a) and 416.945(a). Ordinarily, RFC  
18    represents a claimant's maximum ability to perform sustained  
19    work activities in an ordinary setting on a regular and  
20    continuing basis claiming eight hours a day for five days a  
21    week or an equivalent schedule. An RFC determination is  
22    informed by consideration of a plaintiff's physical and  
23    mental abilities, symptomology, and other limitations that  
24    could interfere with work activities on a regular and  
25    continuing basis, as well as all of the relevant medical and

1 other evidence. *Tankisi v. Commissioner of Social Security*,  
2 521 F. Appendix 29, 2nd Circuit 2013.

3 In this case, as I indicated, the issues really  
4 boil down to whether plaintiff would be unable to perform,  
5 based on being off task, absent, as well as her inability to  
6 relate to others. And physically, whether plaintiff can meet  
7 the standard work requirements of light work and whether she  
8 would need to change positions is something that is not  
9 incorporated into the RFC.

10 Mentally, there is -- I guess I should say that  
11 light work does require the ability to stand or walk a total  
12 of approximately six hours in an eight-hour workday. The  
13 requirements of light work are included in 20 CFR Section  
14 404.1567(b), as well as Social Security Ruling 83-10, and are  
15 fleshed out in the Second Circuit's decision in *Poupore vs.*  
16 *Astrue*, 566 F. 3d 303 from 2009. Mentally, there are several  
17 opinions in the record. There is the opinion of Dr. T.  
18 Harding. It was technically a prior administrative medical  
19 finding. It is from September 6, 2019. It appears at 221 to  
20 256 of the administrative transcript.

21 In assessing the so-called B criteria, Dr. Harding  
22 concluded that plaintiff is moderately limited in social  
23 functioning and moderately limited in maintaining  
24 concentration, persistence, or pace. The ultimate mental  
25 residual functional capacity finding of Dr. Harding is,

1 quote, based upon a review of the available medical evidence  
2 of record, the claimant is capable of simple, unskilled work  
3 on a sustained basis. The ALJ concluded that that opinion is  
4 entitled to great weight, at page 1028 of the administrative  
5 transcript, with regard to the RFC, and did not comment on  
6 the B criteria worksheet.

7 Dr. Harding obviously is a non-examining physician  
8 who -- a psychologist, who had the benefit of available  
9 records at the time that opinion was rendered. I agree that  
10 the -- one, there is a body of case law that suggests that  
11 one can infer from such an opinion that plaintiff is able to  
12 meet the requirements of a -- the ability to perform on a  
13 sustained basis for an eight-hour workday for a five-day  
14 week. *Annjeanette B. vs. Kijakazi*, 2023 WL 3040663 from the  
15 Northern District of New York, April 21, 2023.

16 However -- and I also know and agree that a prior  
17 administrative medical finding can, can provide substantial  
18 evidence to support a determination if it is consistent with  
19 the record. That's *Woytowicz v. The Commissioner of Social*  
20 *Security*, 16 WL 6427787 from October of 2016. The report and  
21 recommendation of Magistrate Judge William B. Carter was  
22 adopted at 2016 WL 6426385 in October of 2016.

23 However, there is a body of case law that suggests  
24 in mental health cases, it is inherently less valuable  
25 because of the subjective nature of mental impairment. I

1 should say that the analysis of medical opinions in this case  
2 is governed by the former regulations because plaintiff's  
3 application was filed prior to March 17, 2017. Under those  
4 regulations, the ALJ was required to consider whether the  
5 opinion was consistent with and supported. Those are the  
6 factors that are key under the new regulations, of course.  
7 And a weight to be given is subject to factors, including  
8 frequency, length, nature, and extent of treatment and the  
9 amount of medical evidence supporting the opinion, if it is a  
10 source opinion, whether it is consistent with the remaining  
11 medical evidence and whether the physician is a specialist.  
12 And of course, as always, an ALJ must flesh out and provide  
13 good reason for the weight afforded to any opinion of record.  
14 If it is a treating source, of course, it is entitled to  
15 controlling weight, if it is supported in this case.

16 So in determining -- in reviewing this case,  
17 Dr. Harding's opinion stands in stark contrast to a great  
18 body of evidence, including evidence from two consultative  
19 examiners, as well as plaintiff's treating sources. And as  
20 will be seen, I find that Dr. Harding's opinion is not  
21 supported by substantial evidence and is fatally vague with  
22 respect to plaintiff's functioning in areas being off task  
23 and attendance and relating to others.

24 There is also an opinion from an examining  
25 consultant Dr. Mary Ann Moore from May 18, 2016. It's at 690

1 to 695 in the administrative transcript. Dr. Moore concluded  
2 that plaintiff has moderate to marked limitations in her  
3 ability to maintain a schedule and to relate to others. The  
4 ALJ concluded that Dr. Moore's opinion was entitled to some  
5 weight. That's at 1027. Significantly, ALJ Koennecke  
6 acknowledges the marked -- the moderate to marked  
7 limitations, but does not discuss it all while the marked  
8 limitations were rejected or discounted, and I find that to  
9 be an error.

10 There's an opinion from Dr. Amanda Slowik from  
11 August 26, 2016. She was another examining psychologist. It  
12 appears at 701 to 706 of the administrative transcript.  
13 Dr. Slowik also finds moderate to marked limitations in the  
14 ability of plaintiff to maintain a schedule and to relate  
15 adequately to others. Dr. Slowik's opinion is given some  
16 weight at 1028, but the marked -- at least in this case, she  
17 does say that the marked limitation is not indicated, but  
18 does not elaborate as to why.

19 There are also several opinions from  
20 Nurse Practitioner Caroline Murphy. One is from October 30,  
21 2018, and cosigned by licensed medical social worker Jessica  
22 Meade. It appears at 1388 to 1399 of the administrative  
23 transcript that finds plaintiff is markedly limited, which is  
24 defined as more than 33 percent in the ability to maintain a  
25 regular attendance and perform within a schedule, but states



1 that the author of the opinion is unable to quantify the  
2 percentage or number of absences.

3 There is another subsequent opinion from Nurse  
4 Practitioner Murphy from February 27, 2019, that's at 1391 to  
5 1392, finds a moderate limitation defined as 20 to 33 percent  
6 in the ability to maintain regular attendance and perform  
7 within a schedule. Again, unable to quantify the specific  
8 extent.

9 Significantly, on January 10, 2023, Nurse  
10 Practitioner Murphy indicates at page 1538, there is no  
11 change in plaintiff's condition. The Administrative Law  
12 Judge provided -- afforded Nurse Practitioner Murphy's  
13 opinion very great weight at 1030, but found the marked  
14 limitation to be inconsistent with the medical record,  
15 plaintiff's activities of daily living, her normal mental  
16 status exams, conservative treatment, ability to perform to  
17 care for a family member, ability to attend appointments, and  
18 her desire to pursue a career in phlebotomy.

19 Dr. Anne Calkins provided an opinion on March 15,  
20 2019, that's at 1394 to 1395, found that plaintiff would be  
21 off task 20 to 33 percent of the time, would be absent more  
22 than four times per month. The ALJ afforded this opinion  
23 some weight at 1030, but found it to be speculative and  
24 inconsistent with the record, including activities of daily  
25 living.

1           Physician's Assistant Kacy Zelesnikar, who has  
2           treated the plaintiff over time, issued an opinion on  
3           June 28, 2018. It's at 896 to 901. She opined plaintiff  
4           should reach off task 20 to 33 percent of the time and absent  
5           three times per month. She also noted that market  
6           limitations to find as more than 33 percent in plaintiff's  
7           ability to maintain regular attendance, a median of 20 to  
8           33 percent limitation in the ability to perform within a  
9           schedule, accept instructions and respond appropriately to  
10          supervisors.

11           On January 6, 2013, at page 1530 and again at 1534,  
12          Physician's Assistant Zelesnikar indicates there was no  
13          change to plaintiff's condition. ALJ Koennecke afforded  
14          those opinions little weight, that's at 1028 to 1029, on the  
15          basis that, one, she was not an acceptable medical source.  
16          Two, ALJ Koennecke states that plaintiff was not treating  
17          plaintiff's mental health condition. And, three, the opinion  
18          concerning off task and absenteeism is inconsistent with the  
19          ability to attend medical appointments and is speculative.  
20          She claims that it also loosens up a temporary condition  
21          which ignores the opinion of the physician's assistant at 38F  
22          and 39F that plaintiff's condition was unchanged.

23           Addressing the physical condition of the plaintiff,  
24          Dr. Calkins, in her March 2019 opinion, stated that plaintiff  
25          needs to be able to change positions every 15 minutes and can

1 only stand and/or walk two hours out of eight hours.

2 ALJ Koennecke concluded that this is inconsistent  
3 with plaintiff's treatment records. At 1030 of her opinion.  
4 Physician Assistant Zelesnikar, on June 28, 2018, stated that  
5 plaintiff would need the ability to change positions every 30  
6 minutes and can stand and/or walk only five hours out of an  
7 eight-hour day.

8 Dr. Gilbert Jenouri issued two opinions; one from  
9 May 18, 2016, at 696 to 700. He found moderate limitations  
10 in plaintiff's ability to walk and stand two to four hours.  
11 On August 26, 2016, at 708 to 715, Dr. Jenouri found mild  
12 restriction in plaintiff's ability to walk, sit, and sit for  
13 long periods.

14 ALJ Koennecke concluded that plaintiff's -- that  
15 Dr. Jenouri's decision opinion from May of 2016 was entitled  
16 to less weight and that the subsequent opinion was entitled  
17 to some weight. That's at 1029.

18 In my view, the ALJ's opinion is laced with errors.  
19 The ALJ, as I indicated before, acknowledged Dr. Moore's  
20 moderate to marked limitation opinion, but gave no  
21 explanation as to why it was not reflected in the RFC.  
22 That's at 1027. *Loucks v. Kijakazi*, 2022 WL 2189293 from the  
23 Second Circuit June of 2022, indicating that it was error in  
24 a similar circumstance not prior to any explanation. The  
25 determining -- the finding of errors is also supported by

1     *Wayne I. v. Saul*, 2020 WL 3566626 from the Northern District  
2     of New York, July 2020.

3             In that case, the late Judge Norman A. Mordue, one  
4     of my colleague Judges, indicated, quote, "The ALJ's decision  
5     affords Dr. Lewis's opinion considerable weight, but then  
6     fails to support specifically explaining why she rejected  
7     Dr. Lewis's findings of marked limitations to dealing with  
8     stress and relating adequately with others."

9             Dr. Slowik acknowledges, marked limitations and the  
10    ALJ acknowledges it, but does not state specifically why it  
11    was rejected, other than stating in conclusory fashion that  
12    it is, quote, "not indicated." That's at 1028.

13            There is no explanation, moreover, as to how  
14    Dr. Harding and Dr. Slowik's finding of moderate limitations  
15    are accommodated in the RFC. And, critically, Dr. Calkins  
16    was identified in a submission to the Social Security  
17    Administration appeals counsel by plaintiff's counsel as a  
18    treating source. We can't be sure because there are no  
19    treatment records in the record from Dr. Calkins, but there  
20    should have been a discussion as to whether Dr. Calkins was a  
21    treating source. And, if so, why her opinion would not be  
22    entitled to controlling weight. There is discussion of  
23    neither in the decision.

24            I also find error in the statement by  
25    Administrative Law Judge Koennecke that the physician's

1 assistant that has treated plaintiff since 2014 did not treat  
2 plaintiff's mental conditions. It's clear from my review of  
3 the medical evidence that that's not true.

4 There is also a conclusory rejection of Physician's  
5 Assistant Zelesnikar's opinion regarding the need to change  
6 positions, which is consistent with Dr. Calkins. There is no  
7 opinion on that issue from Dr. Jenouri. And there is no  
8 state agency consultant who issued a prior medical finding  
9 with regard to plaintiff's physical RFC. It was a -- it was  
10 performed by a single decision-maker whose decision is  
11 entitled to no weight.

12 There is also error in no reconciliation of the  
13 limitation on plaintiff's ability to stand and/or walk for  
14 six hours out of an eight-hour day. Dr. Calkins said two  
15 hours. Physician's Assistant Zelesnikar said five hours.  
16 Dr. Jenouri did find moderate limitations in the earlier  
17 decision, but not in the later decision. But aside from  
18 perhaps Dr. Jenouri and the evidence is -- strongly suggests  
19 that both plaintiff's inability to perform that function of  
20 stand or walking six hours in an eight-hour day is required  
21 by light work.

22 In terms of the off task and attendance, it's not  
23 enough to say it is speculative, and the courts have said the  
24 failure -- the ability to attend medical appointments does  
25 not sufficiently indicate the ability to maintain a schedule.

1     *Rucker v. Kijakazi*, 48 F.4th 86 from the Second Circuit 2022.  
2     All opinions that have assessed the ability to perform  
3     consistent with a schedule suggests that plaintiff is not  
4     employable. And those appear to be supported by treatment  
5     notes observing plaintiff's mental health condition.

6             As I indicated, I think it was error to reject out  
7     of hand, Physician's Assistant Zelesnikar's opinion. She  
8     would, by the way, be a treating source under the new  
9     regulations, but she was plaintiff's long-term primary care  
10    provider. As I indicated, it was error to say that she did  
11    not treat plaintiff's mental health condition. And the  
12    ability to keep medical appointments under *Rucker* is not  
13    sufficient to show the ability to perform consistent with a  
14    schedule, and the fact that it may be speculative in and of  
15    itself is not sufficient. *Annjeanette B.*

16            I find it difficult there was no reconciliation  
17    between the two opinions from Dr. Jenouri, which was given  
18    only three months apart. *Rucker* indicates that. There's no  
19    explanation of how the moderate limitations identified by  
20    Dr. Harding, Dr. Moore, Dr. Slowik, et cetera, are consistent  
21    with the RFC, since there is no limitation in the RFC  
22    addressing off task and absences.

23            *Reynolds v. Colvin*, 2014 WL 4184729 from the  
24    Northern District of New York, March, 21, 2014, the ALJ's  
25    reliance on plaintiff's activities of daily living are not

1 sufficiently linked to the ability to maintain a schedule.  
2 In other words, there is no logical bridge that has been laid  
3 out for us by the Administrative Law Judge as to how they  
4 support the ability to perform, consistent with a regular  
5 schedule.

6 In that precludes meaningful judicial review.  
7 There is also --

8 (Peter Gorton, Esq. was disconnected from the  
9 teleconference.)

10 THE COURT: We will wait a second for  
11 Attorney Gorton to re-enter.

12 (Peter Gorton, Esq. was reconnected to the  
13 teleconference.)

14 THE COURT: As I indicated, the ALJ's general  
15 reference without specific treatment records is insufficient.  
16 *Annjeanette B.*, I cited that case earlier.

17 I also think there might be some problem with the  
18 step two determination. I know that the test at step two is  
19 extremely modest. It tended to screen out only the -- only  
20 the -- it requires the ALJ to identify severe impairments.  
21 That is, any that significantly limit a physical and mental  
22 ability to perform basic work activities. It's de minimus  
23 and it tends to screen out only the truly weakest of cases.  
24 So I think the right knee of the plaintiff is considered,  
25 but -- and not found to be a medically determinable

1 impairment.

2           There is no discussion of the left knee as to  
3 whether to conduct a -- consistent with medical impairment --  
4 a medically determinable impairment. The ALJ simply  
5 indicates that it does reference left knee pain at 1017. It  
6 does not determine whether the impairment is or is not  
7 medically determinable.

8           At 1018, there is a statement, however, for any  
9 symptoms related to the claimant's left knee impairment  
10 discussed below have been considered under claimant's  
11 myofascial pain syndrome diagnosis. So I think there may be  
12 error in not including left knee as a medically determinable  
13 impairment. Whether it is harmful or not, I am not sure,  
14 because there is that statement that the condition and the --  
15 and the associated symptoms have been considered. It is  
16 potentially harmful because it bears on the ability to stand  
17 and walk consistent with light work. So I'm not making a  
18 finding there, but I think the matter should be examined on  
19 remand.

20           So, in short, I am granting judgment on the  
21 pleadings to the plaintiff. I find multiple errors that  
22 result in infecting the ultimate determination of no  
23 disability. I am tempted to find a direct -- to find  
24 disability and direct a finding, but -- in light of the age  
25 of the case, but I simply couldn't find persuasive evidence



1 of disability. And I think if plaintiff was limited to  
2 sedentary work, a vocational expert could potentially find  
3 positions that plaintiff is capable of performing.

4 So I am going to remand the matter consistent with  
5 Commissioner's regulations. I think it will be assigned to a  
6 new Administrative Law judge, which I think will hopefully  
7 provide a fresh look at all of the relevant evidence in this  
8 case, which is massive.

9 So on remand, the Administrative Law Judge should  
10 examine both the mental and physical impairments of the  
11 plaintiff and -- resulting from the patient and should state  
12 any conclusions with sufficient clarity to permit proper  
13 judicial review.

14 Thank you again, both of you. I hope you have a  
15 good rest of the day and rest of your summer.

16 MR. GORTON: Thank you, your Honor.

17 MS. BROWN CASEY: Thank you, your Honor.

18 (Court adjourned, 12:03 p.m.)  
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25

CERTIFICATE OF OFFICIAL REPORTER

I, LISA M. MAZZEI, RPR, Official U.S. Court  
Reporter, in and for the United States District  
Court for the Northern District of New York, DO  
HEREBY CERTIFY that pursuant to Section 753, Title  
28, United States Code, that the foregoing is a true  
and correct transcript of the stenographically  
reported proceedings held in the above-entitled  
matter and that the transcript page format is in  
conformance with the regulations of the Judicial  
Conference of the United States.

Dated this 24th day of July, 2024.

/S/ LISA M. MAZZEI

LISA M. MAZZEI, RPR  
Official U.S. Court Reporter

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